THE CO-OPERATIVE CENTRAL BANK LTD.

v.

FEYEN DEVELOPMENT SDN. BHD.

FEDERAL COURT, MALAYSIA
EUSOFF CHIN CJ
EDGAR JOSEPH JR FCJ
WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO: 02-519-1993]
31 MAY 1997

CONSTITUTIONAL LAW: *Courts - Stare decisis - Whether open to Court of Appeal to ignore decisions of Federal Court - Whether open to Court of Appeal to disregard Federal Court judgments as per incuriam - Whether necessary for each lower tier to loyally accept decisions of higher tiers*

CONSTITUTIONAL LAW: *Courts - Stare decisis - Conflicting decisions within same tier - Young v. Bristol Aeroplane Co. - Guidelines - Whether lower tiers entitled to question considered decisions of upper tiers*

CONSTITUTIONAL LAW: *Courts - Stare decisis - Ratio decidendi - Obiter dicta - Per incuriam - Conceptual differences - Whether open to lower Court to declare decision of higher Court as per incuriam*

COMPANY LAW: *Directors - Loans - Loan to director by third party - Security by way of charges provided by director's company - Breach of s. 133(1) of Companies Act 1965 - Whether gives rise to civil consequences - Whether charges void and unenforceable - Effect of s. 133(5) of Companies Act 1965*

COMPANY LAW: *Directors - Loans - Loan to director by third party - Security by way of charges provided by director's company - Breach of s. 133(1) of Companies Act 1965 - Whether s. 133(5) of Companies Act 1965 preserves validity of such charges - Whether ss. 241(3)(a) & 301(c) of National Land Code 1965 relevant - Whether there is 'cause to the contrary' within meaning of s. 256(3) of National Land Code 1965*

LAND LAW: *Charge - Security - Provided by director's company for loan by third party to director - Breach of s. 133(1) of Companies Act 1965 - Effect of s. 133(5) of the Companies Act 1965 - Whether s. 133(1) of Companies Act 1965 is a prohibition or a limitation within meaning of ss. 241(3)(a) or 301(c) of National Land Code 1965*

The instant application by Feyen Development Sdn. Bhd. was a sequel to the judgment of the Federal Court in *The Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd.* (‘*Feyen*’) which had held that charge transactions under the National Land Code 1965 (‘the NLC’) which breach s. 133(1) of the Companies Act 1965 (‘the CA’) do **not** give rise to civil consequences, and, the subsequent judgment of the Court of Appeal in *Harta Empat Sdn. Bhd. v Koperasi Rakyat Bhd.* (‘*Harta Empat*’) which held to the **contrary** on the ground that the judgment of the Federal Court in *Feyen* on the point at issue was merely ‘***obiter***’.

Ostensibly, the instant application was couched in terms of a prayer for ‘clarification and rectification’ in respect of *Feyen*, but was, intrinsically, an invitation to the instant Court to revisit *Feyen* and to reverse it having regard to *Harta Empat*.

Held:

Per Edgar Joseph JR FCJ

[1] It is elementary that a decision would have been given *per incuriam* if a statute or a rule which would have affected the decision was not brought to the attention of the Court. Conversely, an *obiter dictum* is a mere chance remark by the Court and is used in contradistinction to a *ratio decidendi* or a rule of law for which a case is authority. Thus and so, it was obvious that the Court of Appeal, in *Harta Empat*, had meant to say that the decision of the Federal Court in *Feyen* was given *per incuriam*.

[1a] It is **not** open to the Court of Appeal to give gratuitous advice to Judges of first instance to ignore decisions of the Federal Court; if it were open to the Court of Appeal to do so, it would be highly undesirable. In the hierarchical system of Courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co.* offers guidance to **each tier** in matters affecting **its own** decisions. It does **not** entitle it to question considered decisions in the **upper tiers** with the same freedom. It is hoped that it will **not** be necessary for the Federal Court to have to remind the Court of Appeal of this principle over and again.

[2] Notwithstanding a breach of s. 133(1) of the CA – having regard to the effect of the all important s. 133(5) of the CA – s. 133(1) of the CA is **neither** a prohibition **nor** a limitation within the meaning of s. 241(3)(a) of the NLC or s. 301(c) of the NLC respectively.

[2a] Section 133(5) of the CA had preserved the validity of the charges concerned in *Feyen*; thus, both ss. 241(3)(a) & 301(c) of the NLC had **no** application thereon. Consequently, there was no 'cause to the contrary' within the meaning of s. 256(3) of the NLC.

[2b] Both ss. 241(3)(a) & s. 301(c) of the NLC were utterly **irrelevant** to the issues which arose for decision in *Feyen* and, consequently, were not even mentioned therein. Therefore, the judgment of the Federal Court in *Feyen* on the point at issue was **not** given *per incuriam*. Conversely, the judgment of the Court of Appeal in *Harta Empat* was given *per incuriam* as it had entirely neglected s. 133(5) of the CA which would have been fatal to its reasoning.

[2c] In the result, the instant Court was **not** persuaded to depart from what it had said on the point at issue in *Feyen*. And, although the instant Court was not at liberty to overrule *Harta Empat* (it being the subject of a pending application for leave to appeal to the instant Court), the instant Court was at liberty to say that the decision in *Harta Empat* could not stand with the instant Court's decision in *Feyen*.

[Application dismissed; order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PERLEMBAGAAN: *Mahkamah - Stare decisis - Samada terbuka kepada Mahkamah Rayuan untuk tidak menghiraukan keputusan Mahkamah Persekutuan - Samada terbuka kepada Mahkamah Rayuan untuk tidak menghiraukan penghakiman Mahkamah Persekutuan menurut per curiam - Samada perlu bagi setiap peringkat bawahan untuk secara setianya menerima keputusan-keputusan peringkat atasan*

UNDANG-UNDANG PERLEMBAGAAN: *Mahkamah - Stare decisis - Keputusan-keputusan yang bercanggahan di dalam peringkat yang sama - Young v. Bristol Aeroplane Co. - Garispanduan - Samada peringkat bawahan berhak untuk menyoal keputusan-keputusan yang telah dipertimbangkan oleh peringkat atas*

UNDANG-UNDANG PERLEMBAGAAN: *Mahkamah - Stare decisis - Ratio decidendi - Obiter dicta - Per curiam - Perbezaan fahaman - Samada terbuka kepada Mahkamah rendah untuk mengisytiharkan keputusan Mahkamah Tinggi sebagai per curiam*

UNDANG-UNDANG SYARIKAT: *Pengarah-pengarah - Pinjaman-pinjaman - Pinjaman kepada Pengarah oleh pihak ketiga - Jaminan melalui gadaian yang diberikan oleh syarikat pengarah - Kemungkiran s. 133 (1) Akta Syarikat 1965 - Samada membangkitkan kepentingan sivil - Samada gadaian tak sah dan tidak dapat dikuatkuasakan - Kesan s. 133(5) Akta Syarikat 1965*

UNDANG-UNDANG SYARIKAT: *Pengarah-pengarah - Pinjaman-pinjaman - Pinjaman kepada pengarah oleh pihak ketiga - Jaminan melalui gadaian diberikan oleh syarikat pengarah - Kemungkiran s. 133(1) Akta Syarikat 1965 - Samada s. 133(5) Akta Syarikat 1965 mengekalkan keesahan gadaian-gadaian sedemikian - Samada ss. 241(3)(a) & 301(c) Kanun Tanah Negara 1965 relevan - Samada terdapat "cause to the contrary" dalam lingkungan maksud s. 256(3) Kanun Tanah Negara 1965*

UNDANG-UNDANG TANAH: *Gadaian - Jaminan - Gadaian diberikan oleh syarikat pengarah bagi pinjaman oleh pihak ketiga kepada pengarah - Kemungkiran s. 133(1) Akta Syarikat 1965 - Kesan s. 133(5) Akta Syarikat 1965 - Samada s. 133(1) Akta Syarikat 1965 merupakan satu larangan atau satu penghadan dalam lingkungan maksud ss. 241(3)(a) atau 301(c) Kanun Tanah Negara 1965*

Permohonan ini oleh Feyen Development Sdn Bhd adalah merupakan satu susulan kepada penghakiman Mahkamah Persekutuan dalam *The Co-Operative Central Bank Ltd. v. Feyen Development Sdn Bhd. ('Feyen')* yang mana telah memutuskan bahawa transaksi gadaian di bawah Kanun Tanah Negara 1965 ('KTN') yang memungkiri s. 133(1) Akta Syarikat 1965 ('AS') **tidak** membangkitkan kepentingan sivil, dan, penghakiman kemudiannya oleh Mahkamah Rayuan dalam *Harta Empat Sdn. Bhd. v. Koperasi Rakyat Bhd.* ('Harta Empat') yang memutuskan secara bertentangan atas alasan bahawa penghakiman Mahkamah Persekutuan dalam *Feyen* berhubung dengan perkara yang menjadi isu adalah semata-matanya **'obiter'**

Permohonan semasa ini kelihatannya telah diungkapkan menurut terma-terma satu pohonan untuk 'clarification and rectification' berhubung dengan *Feyen*, tetapi telah, secara intrinsiknya, merupakan satu pelawaan kepada Mahkamah ini untuk menyingkap semula *Feyen* dan untuk mengakaskannya berdasarkan *Harta Empat.*

Diputuskan:
Oleh Edgar Joseph Jr HMP

[1] Ianya adalah satu perkara asas bahawa sesuatu keputusan mungkin telah diberikan secara *per incuriam* jika sesuatu statut atau kaedah yang telah

menjejaskan keputusan telah tidak dibawa ke perhatian Mahkamah. Sebaliknya, *obiter dictum* adalah satu kenyataan yang dibuat secara kebetulan oleh Mahkamah dan digunakan secara yang berbeza dengan *ratio decidendi* atau satu kaedah Mahkamah bagi yang mana sesuatu kes itu merupakan autoriti. Dengan itu dan dengan yang demikian, adalah jelas bahawa Mahkamah Rayuan, dalam *Harta Empat*, telah bermaksud untuk menyatakan bahawa keputusan Mahkamah Persekutuan dalam *Feyen* telah diberikan *per incuriam*.

[1a] Adalah tidak terbuka kepada Mahkamah Rayuan untuk memberikan nasihat kepada Hakim-Hakim Mahkamah pertama untuk tidak menghiraukan keputusan-keputusan Mahkamah Persekutuan; jika ianya terbuka kepada Mahkamah Rayuan untuk berbuat sedemikian, maka ianya menjadi sesuatu yang tidak dikehendaki. Dalam hierarki sistem Mahkamah yang wujud dalam negeri ini, ianya adalah perlu bagi setiap peringkat bawahan, termasuk Mahkamah Rayuan, untuk menerima tanpa berbelah bagi keputusan-keputusan peringkat atasan. Di mana keputusan-keputusan dengan nyatanya bercanggahan, keputusan dalam *Young v. Bristol Aeroplane Co.* menawarkan bimbingan kepada setiap satu peringkat dalam perkara-perkara yang menjejaskan keputusannya yang tersendiri. Ianya tidak memberikan kepadanya untuk menyoal keputusan-keputusan yang telah dipertimbangkan dalam peringkat atasan dengan kebebasan yang sama. Adalah diharapkan bahawa ianya menjadi tidak perlu bagi Mahkamah Persekutuan untuk mengingatkan Mahkamah Rayuan berhubung dengan prinsip ini berulangkali.

[2] Meskipun terdapat kemungkiran akan s. 133(1) AS – mengambil perhatian akan kesan s. 133(5) AS yang amat penting itu – s. 133(1) AS **bukannya** merupakan satu larangan **ataupun** satu penghadan dalam lingkungan maksud s. 241(3)(a) atau s. 301(c) KTN masing-masingnya.

[2a] Seksyen 133(5) AS telah mengekalkan keesahan gadaian-gadaian yang berkaitan dalam *Feyen*; dengan itu, kedua-duanya ss. 241(3)(a) & 301(c) KTN tidak terpakai ke atasnya. Akibatnya, tidak terdapat "cause to the contrary" dalam maksud s. 256(3) KTN.

[2b] Kedua-duanya ss. 241(3)(a) dan s. 301(c) KTN adalah amat tidak relevan kepada isu-isu yang berbangkit untuk keputusan dalam *Feyen* dan, akibatnya, telah tidak disebut sama sekali di dalamnya. Dengan itu, penghakiman Mahkamah Persekutuan dalam *Feyen* berhubung dengan perkara yang menjadi isu telah tidak diberikan *per incuriam*. Sebaliknya, penghakiman Mahkamah Rayuan dalam *Harta Empat* telah diberikan *per incuriam* kerana ianya telah secara menyeluruh mengabaikann s. 133(5)

AS yang mana mungkin akan memudaratkan alasannya.

[2c] Akibatnya, Mahkamah ini **tidak** terpengaruh untuk menyimpang daripada apa yang telah ia perkatakan mengenai perkara yang menjadi isu dalam *Feyen*. Dan, walaupun Mahkamah ini tidak mempunyai kebebasan untuk menolak *Harta Empat* (ianya merupakan hal-perkara suatu permohonan yang menantikan penyelesaian bagi mendapatkan kebenaran untuk merayu kepada Mahkamah ini), Mahkamah ini mempunyai kebebasan untuk menyatakan bahawa keputusan dalam *Harta Empat* tidak boleh berdiri seiring dengan keputusan Mahkamah ini dalam *Feyen*.

[Permohonan ditolak; perintah sekadarnya.]

Cases referred to:

The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(aff)***

Harta Empat v. Koperasi Rakyat Bhd [1997] 2 CLJ 94 ***(not foll)***

Young v. Bristol Aeroplane [1944] 1 KB 718 ***(refd)***

Cassell and Co Ltd v. Broome [1972] AC 1027 ***(foll)***

Yango Pastoral Co Pty Ltd v. First Chicago Australia ***(foll)***

The Batu Pahat Bank Ltd. v. The Official Assignee [1933] MLJ 237 ***(foll)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1990] 2 MLJ 365 ***(ovrd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(cit)***

Legislation referred to:

Companies Act 1965, s. 133(1), (5)

Essential (Protection of Depositors) 1986, reg. 9(1), (b)

National Land Code 1965, ss. 241(3)(a), 256(3), 257(1)(a), (b), (c), 260(2), 265(2), (3)(a), (b), (c), 301(c)

For the applicant - Hira Singh; M/s. Asbir, Hira Singh & Co.
For the respondent - Vijendran Ponniah (Murali Achan with him); M/s. Vije & Co.

JUDGMENT

Edgar Joseph Jr FCJ:

This application is a sequel to our judgment in the case of *The Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd.* [1995] 4 CLJ 300 which held that Charge transactions under the National Land Code 1965 ('the Code') which breached s. 133(1) of the Companies Act 1965 ('the Act'), did not give rise to civil consequences, and the subsequent judgment of the Court of Appeal in *Harta Empat* [1997] 2 CLJ 94, which held to the contrary, on

the ground that that part of our judgment was mere *obiter*.

With respect, it is difficult to see how the criticism that this application by Feyen Development Sdn. Bhd. although couched in terms of a prayer for "clarification and rectification" of our judgment in *Feyen*, is really a facade for inviting us to revisit *Feyen* and to reverse it having regard to *Harta Empat*, can be rebutted. Our reasons for this will appear later.

In *Harta Empat*, the Court of Appeal, whilst on the one hand, paying lip service to our judgment in *Feyen*, when it said: ([1997] 2 CLJ 94 at p. 98)

> The question whether s. 133(1) of the Companies Act 1965 operates to invalidate a security provided by a company for a loan made to a director of the company by another person in contravention of the subsection or whether it merely prohibits the giving of such security on pain of incurring criminal liability is no longer justiciable, at least in this country, since the decision of the Federal Court in *Co-operative Central Bank Ltd. v. Feyen* [1995] 4 CLJ 300; [1996] 1 SCR 75; [1995] 3 MLJ 313.

then embarked on an attempt to debunk our judgment in *Feyen* in the following remarkable passages:

> The subsection (subsection (1) of s. 133) by itself does not invalidate the forbidden transactions, so that the company may incur civil liability for entering into them; see *Feyen*. However, before the company can be made liable, the transaction itself must be a valid and enforceable one. In the instant case, we are concerned with a charge under the National Land Code so that the question that arises is whether the provisions of the National Land Code operate to invalidate the charge.
>
> *Feyen did not refer to the provisions of the National Land Code when it considered the question of the validity of the two charge transactions in the case, nor did it discuss them. Therefore, any opinion expressed by Feyen on the validity of a charge must necessarily be obiter.* (Italics supplied)

The provisions of the Code, which the Court of Appeal **assumed** that the Federal Court in *Feyen* had overlooked were s. 241(3)(a) and s. 301 condition (c). Commenting on these provisions, the Court of Appeal said, *inter alia*, this:

> Put shortly, a charge is subject to 'any prohibition ... imposed by ... any ... written law for the time being in force' (s. 241(3)(a)). The charge takes effect upon registration (s. 243). Registration of the charge is obtained by presenting it to the Registrar (s. 292(1)(c)) but only if the charge is fit for registration (s. 301), and the charge is fit for registration if condition (c) of s. 301 is satisfied, that is to say, "that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force" (s. 301) condition

(c).

In conclusion, the Court of Appeal said this:

> The upshot is this. Under the National Land Code the immovable property in the instant case could be charged but the charge was subject to any prohibition imposed by written law. Section 133(1) of the Companies Act forbade the appellant company from providing the security for the loan made to its director by the respondent. The prohibition in s. 133(1) had rendered the charge unfit for registration under s. 301, condition (c) of the National Land Code. The charge is therefore invalid.

We are mindful of the fact that *Harta Empat* is the subject of a pending application for leave to appeal to the Federal Court, but Counsel for *Feyen*, Mr. Hira Singh, who was also Counsel for the successful chargor in *Harta Empat*, had expressly relied on the judgment of the Court of Appeal in *Harta Empat* as the authority for the proposition that charge transactions under the Code which breached s. 133(1) of the Act, did give rise to civil consequences and, not to put too fine a point on it, his application now before us prays "for **clarification and if necessary, rectification**" of our judgment in *Feyen* (Emphasis supplied). In these circumstances, whilst we are not at liberty to overrule *Harta Empat*, we are certainly at liberty to say whether having regard to the reasoning in *Harta Empat*, we are persuaded to depart from what we had said in *Feyen*. To put it another way, we are at liberty to say whether the decision in *Harta Empat* can stand with our decision in *Feyen*.

In the first place, we should like to deal with a point of wide ranging importance and this concerns the principle of *stare decisis*, which is a cornerstone of our system of jurisprudence.

In *Harta Empat*, the Court of Appeal, in effect, held that *Feyen* was not binding on it because it had overlooked certain provisions of the Code, to wit s. 241(3) and s. 301 condition (c). It was on the basis of this that the Court of Appeal relegated *Feyen* to mere *obiter dicta*. It is elementary, that where, for example, a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier Court, the decision will have been given *per incuriam*. (See, the third exception per Lord Green MR in *Young v. Bristol Aeroplane* [1944] 1 KB 718). On the other hand, *obiter dictum* is a mere chance remark by the Court and is used in contradistinction to *ratio decidendi* – the rule of law for which a case is authority. Clearly, the Court of Appeal meant to say, that our decision in *Feyen* was given *per incuriam*.

The question therefore arises: whether it is open to an intermediate Court of Appeal, such as the Court of Appeal in this country, to disregard a judgment

of a final Court of Appeal, such as the Federal Court, on the ground that it was given *per incuriam*?

Our task in answering this question, has been made considerably easier by the assistance we have derived from the remarks of Lord Hailsham in *Cassell and Co. Ltd. v. Broome* [1972] AC 1027, which indicate the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it had been given *per incuriam.*

Touching on the repercussions of the Court of Appeal advising Judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p. 1054 B to D):

> ... I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided *"per incuriam"* or "unworkable", they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to Judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put Judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

And, in a famous passage (at p. 1054 D and E) Lord Hailsham concluded this part of the case, by saying:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of Courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. The Bristol Aeroplane Co*. offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, and the duty of the Court of Appeal to accept loyally the decisions of the

House of Lords, and the chaotic consequences which would follow should the Court of Appeal fail in this duty, apply with full force, *mutatis mutandis,* to this country and we adopt what he said. Clearly, the Court of Appeal in *Harta Empat* flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles.

We now move on to consider whether the decision of this Court in *Feyen* was given *per incuriam.*

During the argument before us in *Feyen,* Counsel for the chargor had relied on s. 241(3)(a) of the Code. Counsel for the chargee's response to this was that if s. 133(5) of the Act preserved the validity of the charges concerned, then s. 241(3) of the Code – and we would add, by the same token, s. 301 condition (c) of the Code – would have no application. We considered that Counsel for the chargee was plainly correct in this contention and that was why we had held that no "cause to the contrary" within the meaning of s. 256(3) of the Code had been shown.

By way of amplification, we would add that notwithstanding the breach of sub-s. (1) of s. 133 of the Act, having regard to the effect of the all-important sub-s. (5) of s. 133, as explained by us in *Feyen,* sub-s. (1) of s. 133 is neither a prohibition nor a limitation within the meaning of sub-s. (3)(a) of s. 241 or condition (c) of s. 301 of the Code, respectively. In the words of Gibbs CJ in *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia,* "it is possible for a statute in terms to prohibit a contract and yet to provide expressly or impliedly, that the contract will be valid and enforceable". This proposition is strikingly illustrated by the decision of the Judicial Committee of the Privy Council in *The Batu Pahat Bank Ltd. v. The Official Assignee* [1933] MLJ 237, which is precisely in point.

In *The Batu Pahat Bank* case, the Judicial Committee of the Privy Council was concerned with the question whether a breach of s. 111(3) of the Companies Ordinance which provided that no banking company shall lend any part of its funds on the security of its own shares, operates to invalidate the security or whether it merely prohibits the making of a loan on security under pain of incurring the specified penalties and liabilities.

In answering this question in favour of the appellant bank, their Lordships recognised that the crucial point turned upon the true construction of the section and went on to say this:

> ... Their Lordships can do no other than say that sub-s. 4 means what it says, and that it deals with any loan made in contravention of the section, including, therefore, a loan by a banking company of part of its funds upon the security

> of its shares. If that event happens sub-s. 4 specifies the consequences, and they include a personal liability on directors and managers for "the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities." This is a recognition by the subsection of two things, *viz.* (1) the continuance of the security on which the loan was made and (2) the discharge of the debt *pro tanto* by the proceeds of its realization. In the face of this it seems to their Lordships impossible to say that s. 111(3) operates to invalidate a *lien* which would, apart from that subsection, be an effective *lien*.

It follows, that both sub-s. (3)(a) of s. 241 and condition (c) of s. 301 of the Code were utterly irrelevant to the issues which arose for decision in *Feyen*, and for that reason, were not even mentioned therein. It follows that our judgment in *Feyen* on the point at issue was **not** given *per incuriam*. On the contrary, it was the judgment of the Court of Appeal in *Harta Empat* which was given *per incuriam*, for it entirely overlooked the provisions of sub-s. 5 of s. 133 of the Act which would have been fatal to its reasoning.

That, however, does not conclude our comments on *Harta Empat*. With respect, anyone reading the judgment of the Court of Appeal in *Harta Empat* should not be blamed if he is left with the distinct impression that it was an indirect attempt at resurrecting the decision in *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1990] 2 MLJ 365 – a decision which had been expressly overruled in *Feyen*. For the avoidance of doubt, we have to point out that *Che Wan* which had been interred by *Feyen*, remains interred – in other words, remains overruled.

For the various reasons stated, having carefully studied the judgment of the Court of Appeal in *Harta Empat*, we are not persuaded to depart from anything we had said in *Feyen* and so, even assuming for one moment, that we have the power to rectify, there is nothing for us to rectify. In short, whilst we are not at liberty to overrule *Harta Empat*, since it is the subject of a pending application for leave to appeal to the Federal Court, we are at liberty to say, and we do say, that in our view, the decision in *Harta Empat*, cannot stand with our decision in *Feyen*.

In the second place, we should like to deal with the contention of Counsel for *Feyen* that the Federal Court in *Feyen* was mistaken when it treated the effect of a breach of s. 133(1) of the Act on the validity of the charges under the Code, as the sole question for decision, when it was merely a **preliminary** question of law. It was argued that having held against the chargor on this point, the Federal Court should have remitted the proceedings to the High Court with a direction to hear and determine any **other grounds** the chargor might wish to advance for the purpose of establishing the existence of "cause to the contrary" within the meaning of s. 256(3) of the Code.

Having regard to the course which the proceedings took from first to last, beginning in the High Court and ending on appeal before us – a clear outline of which appears in the affidavit of Mr. Selvathesan a/l Jagasothy affirmed on 20 March 1997 – it was plain as pikestaff, that the question whether a breach of s. 133(1) of the Act operates to invalidate the charges and loan transactions, was not a **preliminary** point at all for it dealt with the whole subject matter of the action without the need for *viva voce* evidence.

To make this point clear, it will suffice if we quote, with approval, the following passages in that affidavit:

> As regards the defendant's contention that *Feyen* only decided on a preliminary issue I am advised by my solicitors and verily believe as follows:
>
> the appeal herein involved two originating summonses, namely Originating Summons No. 31-266-1986 and Originating Summons No. 31-351-1988 filed by the plaintiff and a writ action namely Civil Suit No. 22-18-1991 filed by the defendant. The said originating summonses and the said writ action were consolidated and heard together as one action.
>
> ... None of the issues it is now raising were either pleaded or raised.
>
> Prior to the hearing before the Learned Judge of the High Court, Counsel for the defendant and the former Counsel for the plaintiff entered into a Statement of Agreed Facts and Issue. Paragraph 11 states as follows:
>
> > The sole preliminary issue before the High Court, is to determine the effect of the breach of s. 133 of the Companies Act **and consequently the validity of the charges created and to make the necessary consequential orders.** (The emphasis is added).
>
> It is clear from this paragraph that the parties agreed that the validity of the charges depended solely on the determination of the effect of the breach of s. 133.
>
> Counsel for the defendant at paras. 2 and 4 of his written submission (at p. 72 of the Appeal Record) states as follows:
>
> (a) The chargor defendant has to show cause to the contrary under s. 256(3) of the National Land Code 1965; **the cause being that the charges created are invalid and void *ab initio* having been prohibited by statute: Section 133 of the Companies Act 1965 that prohibits such a transaction.** (The emphasis is added).
>
> (b) In all these three consolidated actions: Two charge actions and one suit, parties are the same and the parties have produced Agreed Facts and Issue dated 24 June 1993 and filed in Court. **Therefore, it is not necessary to take *viva voce* evidence.** (The emphasis is added).

Further the Learned Judge of the High Court in his judgment also stated as follows:

> In the three consolidated actions, the parties are the same and these parties have submitted the agreed facts and issues dated 24 June 1993 and filed in the Court. **Hence in this case there is no need to take oral evidence.** (The emphasis is added).

The question of the validity of the charges was never dealt with by this Court or for that matter by the parties as a preliminary issue. At no time during the appeal did the defendant refer to this question as being a preliminary issue and at no time did the defendant raise any objections to the remittance of the case to the High Court with a direction to grant the Orders for sale, though the defendant had several opportunities to do so:

(a) After delivering the judgment of the Court on the 28 September 1995 this Court asked the Counsel present whether they had anything to say. Counsel for the defendant could have at that time informed the Court, if he so believed, that s. 133 was only a preliminary issue and that therefore the direction to the High Court to grant the Orders for sale ought not to be made.

(b) On 5 December 1995, two copies of the draft orders were sent to the solicitors for the defendant for approval. The solicitors for the defendant did not at that time inform the solicitors for the plaintiff that they would be making an application to rectify the direction made by this Court and that the finalisation of the Order ought to be stayed.

The judgment in *Feyen* was delivered on 28 September 1995. The judgment in *Harta Empat* was delivered on 24 January 1997. The Motion herein was filed on 13 February 1997. It has purportedly taken the defendant more than one year and three months to realize that the Federal Court's decision was in respect of a preliminary issue only.

Prior to the hearing proper the plaintiff had applied to set aside the Statement of Agreed Facts and Issue in order to raise matters outside of the same. The application was resisted by the defendant and Federal Court had ruled in favour of the defendant holding that the parties are confined to the Statement of Agreed Facts and Issue.

Furthermore, we would interpolate, to remark, with respect, that the sequence of events traced in the affidavit aforesaid provide considerable justification for the criticism that the present application was inspired by the judgment of the Court of Appeal in *Harta Empat* and is clearly an attempt to invite us to re-visit *Feyen* and to reverse it, in the light of *Harta Empat*.

We now move on to consider a further contention advanced by Counsel for the chargor.

In the third place, it was contended that the Federal Court having held against the chargor on the s. 133(1) of the Act point, should have remitted the proceedings to the High Court, Seremban, with a direction to hear and determine any **other grounds** the chargor might wish to advance to show the existence of "cause to the contrary" within the meaning of s. 256(3) of the Code, and had it so directed, the chargor would have put forward the following further objections:

(a) That the Federal Court in *Feyen* had no **jurisdiction** to direct the High Court to order the sale of the land held under EMR 655 Lot 1519, Mukim Ampangan, Town and District of Seremban, it being held under Land Office Title, having regard to the provisions of s. 260(2) of the Code which gives this jurisdiction to the Land Administrator. It was pointed out, that it is only when there have been two unsuccessful attempts to sell Land Office land by public auction under the Land Administrator's order, can the land be withdrawn from the sale and referred by the Land Administrator to the High Court, in which event, the High Court may substitute for the order of the Land Administrator, an order for sale under s. 256 of the Code. (See, s. 265(2), (3)(a), (b) and (c) of the Code). It was said that in the present case, there had been neither an order for sale by the Land Administrator nor a reference by him to the High Court with the result that the Federal Court had no jurisdiction to make the remit to the High Court with the direction aforesaid.

(b) That the chargee had charged penalty interest.

(c) That consequent to the decision of the High Court in favour of the chargor, the memorials relating to the charges concerned both in the issue documents of title and in the relevant register documents of title had been cancelled but after the chargee's successful appeal from that decision to this Court, the memorials had been restored, although there had been no order of this Court authorising the same.

As to **ground (a),** which raises a question of jurisdiction, all we need say is that it is perfectly baseless for it is flatly contradicted by a copy of **the order for sale** by the Land Administrator dated 24 June 1987 annexed to the affidavit of Mr. Selvathesan a/l Jagasothy, an appointee of the chargee under reg. 9(1) of the Essential (Protection of Depositors) Regulations 1986, by the Central Bank of Malaysia, and **the Reference** by the Land Administrator to the High Court, made pursuant to s. 265(3)(b) of the Code, which appears at p. 278 of the Record of Appeal. We note, in passing, that the jurisdiction point was

not taken before the Judge in the Court below and, we have no doubt, that had it been taken it would have been given short shrift.

As to **ground (b),** which alleged that the chargee had charged penalty interest, the record of appeal provided shows that Mr. Selvathesan a/l Jagasothy, the appointee of the chargee under reg. 9(1)(b) of the Essential (Protection of Depositors) 1986, had gone on affidavit to deny this allegation, but even if the allegation were true, this would not amount to "cause to the contrary" within the meaning of s. 256(3) of the Code. (See, *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36).

As to **ground (c),** which questions the validity of the restoration of the memorials relating to the charges concerned both on the issue documents of title and the relevant registers document of title, this submission is devoid of all substance. In allowing the appeal, this Court had set aside the judgment of the High Court, that is to say, the whole of that judgment including the order directing cancellation of the memorials aforesaid. The parties were thus restored to the *status quo ante,* and there was thus clear authorisation for the memorials concerned to be restored.

A final point is worth making. The High Court, Seremban, will, without further ado, and in accordance with our directions appearing in the penultimate para of our judgment in *Feyen* [1995] 4 CLJ 300 (at p. 315), make the orders referred to therein. It goes without saying that the orders for sale of the charged lands to be made by the High Court, shall provide for the sale to be by public auction, require the sale to be held on a date specified therein, and specify the total amounts due to the chargee under the charges as at the date on which the orders for sale are made, in accordance with s. 257(1)(a),(b) and (c) of the Code, respectively.

It follows, therefore, that the sole question for decision before the High Court will be: what are the total amounts due to the chargee under the charges, as at the date on which the orders for sale are made and, upon this question, the chargor *Feyen* shall have the opportunity of being heard.

In the result, for the reasons hereinbefore stated, we unanimously hold that this application is misconceived and must be, and is, dismissed with costs.

Reported by Gan Peng Chiang

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